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In The Supreme Court of the United States

OCTOBER TERM, 1970

No. 1267

MACIO BERNARD SIMPSON,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

LOUIS O. FROST, JR.
PUBLIC DEFENDER

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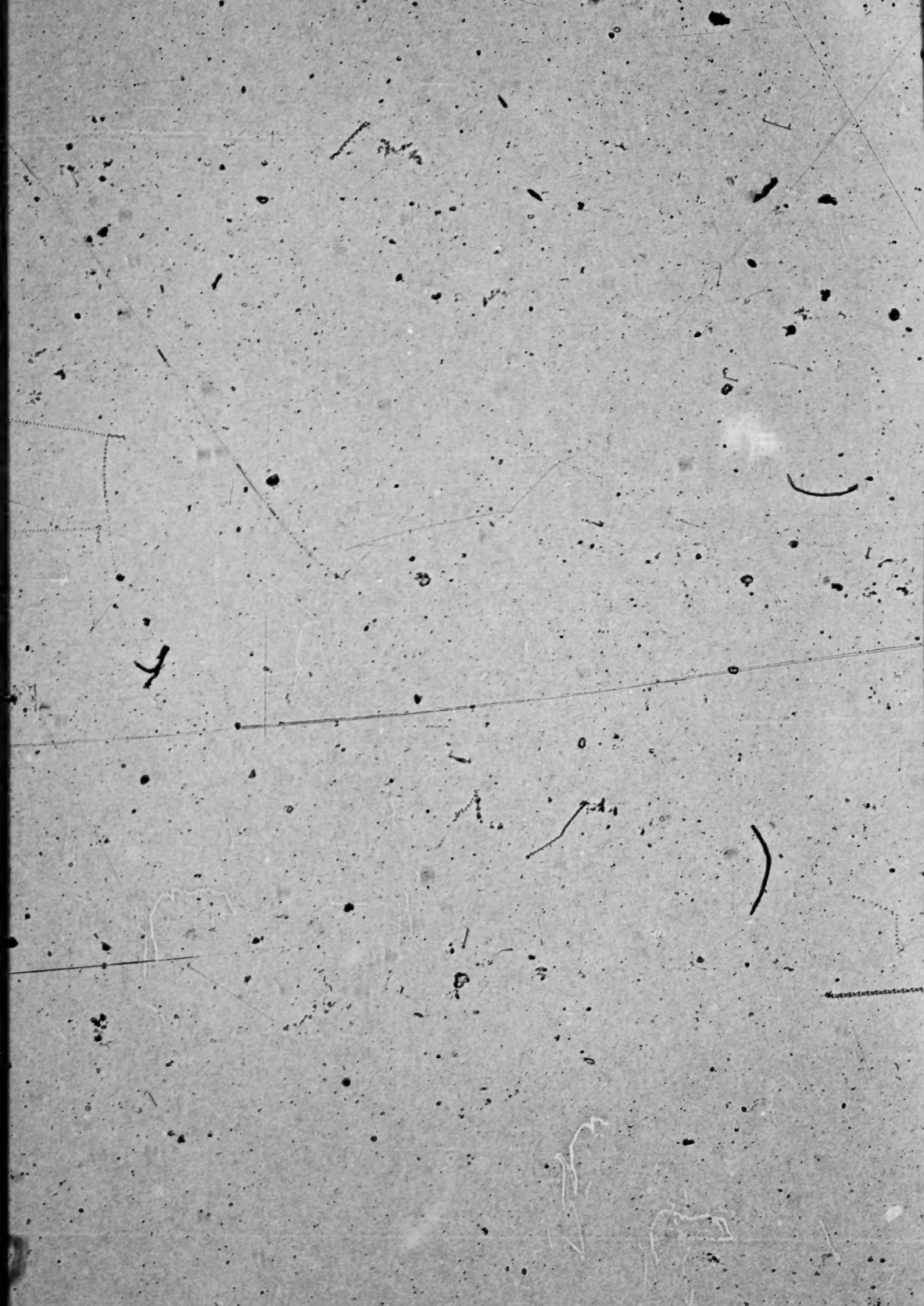
For Petitioner



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Macio Bernard Simpson, petitioner, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, First District, State of Florida, entered in Case No. M-259, on August 4, 1970.

Citations to Opinions Below

The judgment and sentence of the Criminal Court of Record of Duval County, Florida, entered August 26, 1969, (App. 1) is unreported. The opinion and judgment of the District

Court of Appeal, First District, State of Florida, (App. 2) is reported at 237 So.2d 341. The order of that Court denying rehearing, which is the actual portion of the judgment relevant to this petition (App. 2) is also reported at 237 So.2d 341. The order of the Supreme Court of Florida denying petitioner's timely petition for writ of certiorari to the District Court of Appeal, First District (App. 5), is reported at 240 So.2d 645.

Jurisdiction

The judgment of the District Court of Appeal, First District, State of Florida, a court of final appellate jurisdiction in Florida, *Callender v. Florida*, 383 U.S. 270 (1966), was entered on May 14, 1970. Petitioner's timely petition for rehearing was denied August 4, 1970. Petitioner's timely application to the Supreme Court of Florida for writ of certiorari was denied on October 30, 1970. This Court's jurisdiction is invoked under Title 28, U.S.C., Section 1257 (3).

Question Presented

Whether the District Court of Appeal, First District, State of Florida, can refuse to follow the collateral estoppel doctrine as elucidated by this Court in *Ashe v. Swenson*, 25 L.ed 2d 469, by reasoning: A prior conviction (despite reversal and judgment of not guilty upon retrial) creates collateral estoppel in favor of the State, and thereby nullifies *Ashe's* application at the third trial.

Constitutional Provisions Involved

This case involves an asserted right, privilege or immunity secured to petitioner by the Fifth Amendment to the Constitution of the United States, which provides in relevant part,

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

Statement of the Case

Simpson allegedly robbed two persons simultaneously. He was tried for robbing one of the victims and convicted. This conviction was reversed on appeal because the trial court refused to give a requested instruction on a lesser included offense. Upon retrial Simpson was acquitted.

Simpson was then charged with robbing the second victim. Timely motions were filed raising double jeopardy, res judicata and collateral estoppel (App. 5, 6). These were denied. Simpson was convicted at the third trial and sentenced to thirty years imprisonment.

In all three trials the only issue was the identity of the robber.

Simpson appealed to the District Court of Appeal, First District, State of Florida, raising, by assignment of error, brief and oral argument, the issue of collateral estoppel as elucidated by *Ashe*. The conviction was affirmed. Certiorari was denied by the Supreme Court of Florida.

Reasons for Granting the Writ

The District Court of Appeal, First District, states ". . . By its decision in *Ashe*, the United States Supreme Court amended the Fifth Amendment . . ." but concedes ". . . At first blush the case at bar seems to be on all fours with the circumstances presented in *Ashe*, and thus the doctrine of collateral estoppel superficially appears appropriate to this case."

However, the District Court of Appeal then reasons: (1) Collateral estoppel inures to the benefit of the State as well as the defendant. (2) Although Simpson could claim collateral estoppel as a result of the acquittal at the second trial, the State could claim collateral estoppel as a result of the conviction at the first trial. (3) This results in a "double collateral estoppel" which estops Simpson from claiming collateral estoppel at the third trial.

There are three reasons why the decision of the District Court of Appeal is in error. First, collateral estoppel is not mutually available to the State in a criminal case. Second, a reversed judgment cannot be the basis for collateral estoppel. Third, collateral estoppel was not timely raised by the State.

First, in *Ashe* this Court stated at 25 L.Ed. 2d, 469, 475:

> "As a rule of federal law, therefore, '(i)t is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of *lack of 'mutuality'* . . ." (Emphasis added)

United States v. DeAngelo, 138 F.2d 466, (3rd Cir. 1943), states on page 468:

> "Even though there has been no former acquittal of the particular offense on trial, a prior judgment of acquittal on related matters has been said to be conclusive as to all that the judgment determined. Cf. United States v. Adams, 281 U.S. 202, 205, 50 S.Ct. 269, 74 L.Ed. 807. The matter is one of collateral estoppel of the prosecutor. Nor can there be any requirement of mutuality with respect to a criminal judgment's conclusiveness. An accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto. But a rule

> of evidence' has been recognized 'which accords to the accused the right to claim finality with respect to a fact or group of facts previously determined in his favor upon a previous trial.'"

United States v. Carlisi, 32 F.Supp. 479, (E.D. N.Y. 1940), stated on page 482:

> "The courts have frequently referred to the principle of res judicata in criminal cases. In transplanting the doctrine, however, to criminal law the requirement of mutuality had to be abandoned. A prior adjudication with respect to an element of a subsequently tried offense is not binding upon the accused. This is so because the defendant, charged with crime, always has the right to have the jury or the triers of the facts determine anew every element of guilt. People v. Kief, 126 N.Y. 661, 663, (27 N.E. 556); People v. Walker, 198 N.Y. 329, 334, (91 N.E. 806)."

Second, the term "collateral estoppel" refers to that aspect of res judicata which precludes the relitigating of particular issues in a subsequent action on a *different cause of action*. 46 Am.Jur. 2d, Judgments, Section 397 p. 565. In order for res judicata to apply there must be an *existing final judgment*. 46 Am.Jur. 2d Judgments, Section 394, p. 558, Section 457, p. 626. A judgment is inoperative as res judicata where it has been reversed. 46 Am.Jur. 2d, Judgments, Section 465, p. 633.

The conviction at the first trial was reversed and thereby rendered a nullity. The appellant was given a completely new trial. Even in a civil case where collateral estoppel does apply mutually, a reversed judgment is no longer a final judgment for res judicata.

Third. Even assuming the State could have raised collateral estoppel at the second trial, the fact is they did not. The doctrine may not be applied where the judgment is neither pleaded nor offered in evidence. 46 Am.Jur. 2d, Judgments, Section 580, p. 744.

Ashe incorporates collateral estoppel into the double jeopardy protection of the Fifth Amendment. It has been repeatedly held that immunity from double jeopardy is waived unless raised. *U.S. v. Hoyland*, 264 F.2d 346 (7th Cir. 1959), certiorari denied, 361 U.S. 845, rehearing denied, 361 U.S. 904.

Even if we reached the bizarre conclusion that double jeopardy inures to the benefit of the State it has nevertheless been waived since the State did not claim collateral estoppel at the second trial (or at any time until the opinion of the District Court of Appeal).

The argument that it is "unfair" to deny the State the mutual benefit of collateral estoppel can easily be resolved — when an accused is tried, *all* of the crimes arising out of *one* criminal transaction should be tried at *one* trial. Since there is only one trial, neither side can benefit from collateral estoppel.

This policy of *one* trial per criminal transaction has long been advocated by the federal courts. Its inherent fairness and obvious economies are undisputed. Nevertheless, this policy has been universally ignored by prosecutors. The reasons are twofold: (1) The first trial can serve as a dry run for the second prosecution. The State can examine the defendant's entire case and can prepare accordingly. (2) The more times the accused is required to "run the gantlet" the better the odds are for an eventual conviction. If the State loses before one jury, they have an opportunity to try again. Only one long term sentence is really needed.

Hopefully, the collateral estoppel doctrine will encourage prosecutors to try all of the crimes arising out of one transaction at one trial.

If we follow the reasoning of the District Court of Appeal to its logical conclusion, a defendant who allegedly robbed six persons in one holdup, and is tried for robbing the first victim and convicted, he must then be found guilty of all six robberies without further jury determination. It is suggested that this Court did not intend this result in *Ashe*. However, this and other miscarriages of justice may occur on a nationwide scale if the decision of the District Court of Appeals is permitted to stand.

Conclusion

Petitioner's trial and conviction was in violation of his constitutional rights against double jeopardy.

The writ of certiorari should be granted.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

GERALD SOHN
Assistant Public Defender
Counsel of Record
Duval County Courthouse
Jacksonville, Florida 32202

APPENDIX

JUDGMENT AND SENTENCE OF THE CRIMINAL COURT OF RECORD OF DUVAL COUNTY, FLORIDA

Case No. 68-3389

(Entered August 26, 1969)

Now again on this day came the State of Florida by T. Edward Austin as State Attorney for the Fourth Judicial Circuit of the State of Florida, in and for Duval County; came also the defendant, Macio Bernard Simpson, in proper person; Whereupon, the defendant, Macio Bernard Simpson, was adjudged by the Court to be guilty of the offense of Robbery, as charged in the information herein; as found by the Jury; and the said defendant being asked by the Court if he had anything to say why the sentence of the law should not be passed upon him and saying nothing sufficient; It Is, thereupon, considered by the Court and it is the sentence of the law and the judgment of the Court that you, Macio Bernard Simpson, be delivered by the Sheriff of Duval County, Florida, to the proper officer of the State Prison of the State of Florida, there to be confined at hard labor for the full term and period of THIRTY (30) YEARS;

And It Is Further Ordered by the Court that the defendant, Macio Bernard Simpson, is to be given full credit for all time served and unforfeited gain time on the previous sentence imposed by this Court on March 14th, 1967, in Case Number 66-3319, and the defendant, Macio Bernard Simpson, is also to be given credit on this sentence for the time spent in the Duval County Jail from November 9th, 1966.

DONE AND ORDERED in open court at Duval County, Florida, this the 26th day of August, 1969.

/s/ Warren A. Nelson
Judge

JUDGMENT OF THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

(Entered May 14, 1970, Rehearing Denied Aug. 4, 1970)

Reported at 237 So.2d 341

PER CURIAM.

Appellant seeks reversal of a conviction and thirty-year sentence imposed after a jury found him guilty of armed robbery of the Kozy Korner Sundries Store in Jacksonville, Florida, on November 9, 1966.

The principal question raised by appellant is the sufficiency of the evidence to prove his identity as being one of the two persons who committed the crime charged. Our review of the evidence presented to the jury leads us to conclude that the evidence presented a fact question for the jury which resolved the same adversely to the appellant.

We have examined the remaining point raised relating to the instruction given to the jury and find the same to be without merit. See Nelson v. State, 148 Fla. 338, 4 So.2d 375 (1941).

Appellant having failed to demonstrate reversible error, the judgment and sentence herein appealed is affirmed.

CARROLL, DONALD K., Acting C. J., and WIGGINTON and SPECTOR, JJ., concur.

ON PETITION FOR REHEARING

SPECTOR, Judge.

Appellant has filed a petition for rehearing, pro se, asserting that this court failed to consider the doctrine of collateral estoppel as elucidated by the United States Supreme Court in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469. In Ashe, the court held that where a previous judgment

of acquittal was based on a general verdict, the federal rule of collateral estoppel requires the court to examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and to conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. By its decision in Ashe, the United States Supreme Court amended the Fifth Amendment of the Federal Constitution by engrafting upon the double jeopardy clause the federal procedural rule of collateral estoppel.

In reliance upon the holding in Ashe, appellant states that in July, 1968, he was tried on charges of committing a robbery at the Kozy Korner Sundries Store and was acquitted. Allegedly, the basis for acquittal in the July, 1968, trial was the State's inability to establish appellant's identity. Accordingly, appellant argues that if he could not be identified as the person who robbed Patricia Daniels, manager of the Kozy Korner Store, on November 9, 1966, and was acquitted of those charges because of such failure in proof, then the State is collaterally estopped from attempting to prove his identity as being the person who on the same night in question, November 9, 1966, committed a robbery upon one Willie D. Moore at the same time and place. At first blush, the case at bar seems to be on all fours with the circumstances presented in Ashe, and thus the doctrine of collateral estoppel superficially appears appropriate to this case. However, the trial held in July, 1968, on charges of robbing Patricia Daniels was the *second* trial on those charges. Said second trial resulted from a reversal by this court of appellant's conviction in 1967 on the same charges of which he was acquitted in July, 1968. Our opinion leading to said reversal is styled Jonathan Griffin and Macio Bernard Simpson v. State, rendered September 26, 1967, and reported at 202 So.2d 602. As can be seen on the face of said opinion, the reversal was based solely and ex-

clusively on the trial court's failure to instruct the jury on the lesser included offense of larceny as required by Hand v. State and Raulerson v. State, 199 So.2d 100 (Fla.1967). Thus it appears that this constitutes not the second but the third time appellant has been tried on charges arising from the robbery which occurred at the Kozy Korner Store on November 9, 1966. On the first occasion, in 1967, appellant was convicted. We have examined the record in the first appeal and it clearly appears that the appellant's identity and presence at the store on the night of the robbery was adequately established to the jury's satisfaction. Indeed, the sufficiency of the evidence to establish Simpson's identity as the robber was not even raised on the first appeal. The only issue raised was the failure to give the instruction on the lesser included charge; and, of course, the reversal was based only on that issue. So it is then that we have a question of double collateral estoppel in that by application of this doctrine, appellant is estopped from contending without further proof that the State failed to prove the issue of his identity as one of the robbers on the occasion of the second trial inasmuch as on the first trial a jury had found above and beyond a reasonable doubt that appellant was a participant in the robbery.

In view of these circumstances, it hardly seems fair to permit appellant to place any greater reliance on the fact of his acquittal in 1968 than the State can place on the fact of the jury's guilty verdict in the 1967 trial. Clearly, this case emphasizes the vagaries of jury trials and serves to demonstrate the possible clay feet of the Supreme Court's decision in Ashe, supra. And, if collateral estoppel is permitted to operate in favor of one litigant, the same virtues should permit the doctrine to operate in favor of the other litigant.

If, as appellant contends, the searching question which led to his acquittal in the July, 1968, trial was the issue of identification, the equities are balanced against his reliance upon

the doctrine of collateral estoppel by reason of the jury's finding that appellant was one of the robbers in the 1967 trial.

Rehearing is denied and our original judgment of affirmance stands.

CARROLL, DONALD K., Acting C. J., and WIGGINTON, J., concur.

ORDER OF SUPREME COURT OF FLORIDA DENYING WRIT OF CERTIORARI

Case No. 40,191

(Entered October 30, 1970)

The Petition for Writ of Certiorari is denied on jurisdictional grounds but without prejudice to obtain review of the District Court of Appeal's opinion by certiorari direct to the Supreme Court of the United States.

ROBERTS, DREW, THORNAL, CARLTON and ADKINS, JJ., concur

ERVIN, C.J., and BOYD, J., dissent

MOTION OF PETITIONER TO QUASH

Case No. 68-3389

(Filed Sept. 25, 1968)

Comes now the Defendant, Macio Bernard Simpson, by and through his undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, and moves this Court to Quash the Information in this cause for the reason that to subject this Defendant to a trial in this case would be a deprivation of the rights of this Defendant as guaranteed to him by the Constitutions of the United States of America and the

State of Florida in that this Defendant was tried before a jury of his peers on July 9 and July 10, 1968 and was acquitted; that the acquittal in the aforementioned case is a bar to the prosecution attempted herein for the reason that the offense of which he is charged is substantially the same as the former offense for which he was acquitted and said offense arose out of the same occurrences and therefore are controlled by the doctrine of former jeopardy and res judicata.

WHEREFORE, the Defendant respectfully requests that the Information filed herein be quashed.

LOUIS O. FROST, JR.
PUBLIC DEFENDER

By: Leander J. Shaw
Assistant Public Defender

MOTION OF PETITIONER TO DISMISS
Case No. 68-3389
(Filed February 3, 1969)

COMES NOW the Defendant, MACIO BERNARD SIMPSON, by and through his undersigned attorney and files this his Mtoion to Dismiss the Information filed herein, and moves the Court to enter an order dismissing the said Information and releasing the Defendant, and as grounds therefor the Defendant respectfully shows as follows:

1. The Defendant was formerly tried in this Court under an information for robbery in case number 66-5319, and on July 9, 1968, this Defendant was acquitted by the jury as to the information for robbery charged in case number 66-5319, that at said trial, this Defendant's sole defense and the sole issue was that the Defendant was not present at the scene at the time of the alleged crime.

2. The Amended Information for Robbery is based on the same facts and circumstances and time as were tried in the previous case number 66-5319; and in the previous case, the said alleged victim in the subject case testified in the prior case, and in said prior case, the said alleged victim in the present case testified that he had been a victim also.

WHEREFORE, the Defendant moves the Court to dismiss this Information for the reason that the issue in this case was denied in the previous case; and therefore, the State is barred from presenting said issue in the present case by reasons of res judicata and/or estoppel by judgment in that it is an undisputed fact that the Defendant was not present at the time and place of the alleged act.

/s/ G. FRANK GODFREY
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